No. 198

IN THE

Supreme Court of the United States,

OCTOBER TERM—1926.

JOSEPH SEEMAN, *et al.*,
Petitioners,

—against—

PHILADELPHIA WAREHOUSE CO.,
Respondent.

BRIEF FOR PETITIONERS.

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BRIEF FOR PETITIONERS.

This cause comes up upon a writ of certiorari granted by this Court, directed to the Circuit Court of Appeals for the Second Circuit.

Respondent brought the action at law, claiming a money judgment of $8,000 for alleged conversion of 1,000 cases of canned salmon (R. 4).

The complaint (R. 3) based respondent's title to the salmon upon a pledge thereof made by the firm of A. J. Coccaro & Co. to secure "advances of credit" made by it to said firm, and not repaid.

The answer (R. 4-7) admitted purchasing the salmon from said Coccaro & Co. but alleged that petitioners had bought and paid for it in good faith, without any notice of respondent's unrecorded alleged lien thereon (R. 6, fol. 11).

As a defense, petitioners also set forth (R. 5) that the transactions between respondent and Coccaro & Co.,

constituting the alleged "advances of credit", were usurious; that the pledge of the salmon given as security therefor was void—said defense being available to petitioners, as subsequent purchasers of the goods from the borrower, Coccaro, under the principle of

> *Lloyd* v. *Scott*, 4 Peters 205;
> *Merchant's Exchange National Bank* v. *Commercial Warehouse Co.*, 49 N. Y. 635.

The action was commenced in the Southern District of New York on April 6, 1921; trial thereof was begun before Circuit Judge Julian W. Mack and a jury on November 7, 1923. A verdict in favor of the defendants (the petitioners here) was rendered on November 14, 1923, and a motion to set aside was denied by Judge Mack (R. 11).

The judgment and order entered thereon were reversed by the Circuit Court of Appeals (R. 398), with an opinion by Manton, J. (R. 391), reported in 7 Fed. (2nd Series) 999.

Petitioners seek to review such judgment of reversal by the instant writ of certiorari.

The Facts.

Petitioners, under the name of "Seeman Brothers", have been engaged in the wholesale grocery business in New York City since 1886 (R. 187).

On February 17, 1920, they saw an advertisement in the New York "Journal of Commerce", offering for sale 1000 cases of "Blue Boy" salmon (R. 188) which, it appears, was the same lot of salmon which respondent claims in this action. Petitioners applied to one Martin,

the broker who had inserted the advertisement, and, through him (R. 188), bought the salmon from the New York firm of A. J. Coccaro & Co. and paid for it in full, concededly without knowledge of the alleged rights of respondent, and in entire good faith (R. 188, fol. 236).

More than a year after this purchase and payment by petitioners, respondent for the first time (on March 11th, 1921, R. 19, Exhibit J), made claim upon petitioners for 999 of the said 1,000 cases of salmon or their value (R. 187, fol. 235).

Respondent claimed title to the salmon by virtue of a so-called "Pledge Contract" (Plaintiff's Exhibit 21, R. 284) of the goods in question executed to it by Coccaro & Co. when respondent made advances to him upon such merchandise. The nature of such loans is indicated in the following advertisement which respondent maintained in the same "Journal of Commerce" (Exhibit H, R. 364):

"TIME LOANS ON MDSE.
in any responsible warehouse
at ¼% per month over lowest rate
for best commercial paper
No rehypothecation of notes or mdse.
No deposit balance to be maintained.
Interest allowed on prepayments for
releases of mdse.
Philadelphia Warehouse Company
3rd & Chestnut Sts., Phila.
Capital $1,000,000 Surplus $1,000,000
Established 1873."

Respondent—though calling itself a "Warehouse Company"—never owned or operated *any* warehouse *any-*

where (R. 108). Its business was the making of such "Time Loans on Merchandise", though it was not licensed under the banking laws of Pennsylvania or of New York.

Respondent's secretary, Cosgrove, came to New York from time to time and, *in New York,* made arrangements with Coccaro as the result of which the latter got money against the pledge of his merchandise in warehouse (R. 72-130). There were a series of these transactions—and renewals of each of them—but the origin of the business was admittedly as follows. Cosgrove, respondent's secretary, testified (R. 103, fol. 137):

> "Q. So then I am correct in stating that in each one of those transactions that are stated in this Bill of Particulars of yours *you came to New York City and made the arrangements with Coccaro, told him that the deal was closed if you satisfied yourselves as to the* value of the goods, and when you had satisfied yourselves as to the value of the *goods then the deal was closed so* far as the arrangement between you and Coccaro was concerned? A. So far as the agreement to do what we undertook to do was concerned."

This was amplified by McAndrew, an employee of Coccaro, who testified (R. 194):

> "A. I asked Mr. Cosgrove if he would be interested in making a loan on some foodstuffs that we had in a warehouse."

(R. 195):

> "A. He told me that it would cost me one-quarter, one-half, and one per cent. I asked him

did he mean a quarter of one per cent. per annum, or per month, so he told me per month, so I asked him why he did not tell me the exact figure. He said, 'Well, it is the method that we apply in our payments.' He said, 'We get one-quarter of one per cent. for our commissions.' He said, 'We pay one-half or thereabouts, or whatever the money costs us,' and he said, 'The one per cent. you pay to A. U. Surprenant & Company.' I asked him why I should pay A. U. Surprenant & Company, and he told me that was the only way he could do business with me, would be through A. U. Surprenant & Company."

(R. 196, fol. 245):

"Q. At any rate, did Mr. Cosgrove on the second occasion you saw him, produce any printed papers? A. He had this form with him and I know there were two or three signatures required * * *."

The printed form referred to is the so-called "pledge contract" (Exhibit 41A, R. 309, R. 196);

"A. I gave them to Mr. Coccaro and he signed them."

(R. 197):

"Q. Was there anything said at that time or immediately prior to that time that those papers were signed, about the signature or about the contents? A. I looked over the papers.

Q. Tell us what you said, as nearly as you can remember the words. A. As near as I can remember it, I asked Mr. Cosgrove what was the idea of all those papers and he told me that this was

a form that was given to them by their attorneys and the reason for doing it was to comply with the law."

Thus, in addition to interest upon the advances or loans (which current interest in itself was in several instances in excess of 6% per annum, R. 170; also insert after R. 326, under column headed "Rate"), Coccaro was required to pay an additional 3% per year to respondent besides brokerage fees to Lewis of 1/8 of one per cent. a month and commissions to Surprenant, thus bringing up the total rate paid by the borrower to from 21¼% to 23% a year, as follows:

Current interest rate	5½	to	7¼%	per	annum	
Respondent's commission (R. 113)	3	"	3	"	"	"
Lewis customary brokerage (R. 112)	¾	"	1	"	"	"
Surprenant's commissions (R. 227)	12		12	"	"	"
	21¼	"	23¼	"	"	"

Even assuming that Surprenant's charge were not attributable to respondent, the borrower had to pay from 9¼% to 14¼% per annum.

Chief Justice Best declared to the House of Lords (3 Bing. 193) that the policy of all usury laws in modern times is to protect necessity against avarice, and to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and national wealth. It needs but little discussion to show that a violation of these principles brought Coccaro—the borrower in the case at bar—to his ultimate plight, and explains, though it cannot excuse,

his desperate shifts to save himself by selling the salmon in question to petitioners.

With this incidental observation as to cause and effect, we pass to an examination of respondent's plan for effecting its "Time Loan" to Coccaro.

After making the agreement with the borrower at New York, respondent issued its own note to its own note-broker (R. 106) who discounted it and forthwith delivered a check therefor to respondent, and *respondent* transmitted the proceeds of such note to Coccaro in New York. This note-broker—S. B. Lewis & Co., also of Philadelphia—was previously unknown to Coccaro (R. 106), and respondent had Coccaro sign a printed authorization designating Lewis whose name was printed therein as his representative for such purposes (R. 106, fol. 141; Exhibit 22, R. 287).

The "Pledge Contract", and the "Authorization" of Lewis, were printed in advance; all Coccaro had to do was to sign on the dotted lines (R. 106, R. 108, fol. 163).

A list of the entire series of transactions between respondent and Coccaro is contained in Exhibit 39 (R. 302, Insert).

The particular transaction involving the 1,000 cases of Blue Boy Salmon in question valued at $8,400 (Exhibit 21, R. 284) covered a loan thereupon of $5,900 on November 18, 1919, payable January 20, 1920.

The other transactions are relied upon in the complaint (R. 3) to establish an additional unpaid indebtedness from Coccaro to the respondent. It is alleged that the "Blue Boy" salmon was pledged as security for the $5,900 loan (R. 284), and also

> "*inter alia*, as security for other advances made and to be made".

This allegation paraphrases Paragraph 3 of the Pledge Contract (R. 285), and is material, for the complaint alleges the salmon is worth $8,000 (R. 4). In the absence of such an *"inter alia"* allegation, respondent could recover only so much of the salmon as would cover its $5,900 loan.

Necessarily, on the other hand, usury in any of the other transactions thus linked, would prove fatal to respondent's recovery. So the trial Court charged, without exception (R. 275).

Respondent's precise modus operandi in this matter will be most readily seen by examining the original instruments in the transaction of November 18, 1919, involving the Blue Boy Salmon.

On that date, Coccaro, in New York, signed the "Pledge Contract" (Exhibit 21, R. 284), and the "Brokers Authorization" to S. B. Lewis (Exhibit 22, R. 287), endorsed (R. 290) the Bill of Lading for the Salmon (Exhibit 23, R. 288), and drew his check for $30.48, covering respondent's 3% per annum on the $5,900 (R. 76) for 63 days. He delivered these papers in New York to Cosgrove, who took them to Philadelphia next morning (R. 77).

The next morning (November 19, 1919) respondent drew its note (Exhibit 24, R. 291) for $5,900 payable to its own order at the Chase National Bank in New York and delivered it to S. B. Lewis & Co. (Exhibit 24, R. 291). Lewis *immediately* (R. 154) obtained a cashier's check (Exhibit 27, R. 293) from the First National Bank of Philadelphia *payable to the order of respondent* for $5,834.20 (*i. e.*, $5,900, less discount and brokerage) and delivered it, together with its report (Exhibit 25, R. 292) to respondent. Although Lewis claims to have discounted respondent's note subsequently with the Rock-

land National Bank of Boston [see Endorsement on Exhibit 24, R. 291], this seems to have no bearing on the case, as Lewis bought the draft and gave respondent his check. It is especially significant that Lewis neither drew, delivered nor sent any of these papers or checks to the borrower.

Respondent, however, still on the same date, November 19, endorsed the cashier's check to its own order and returned it with a letter (Exhibit 26) to the First National Bank of Philadelphia, directing the latter to telegraph the amount to the credit of A. J. Coccaro & Co. in the Irving National Bank at New York (R. 293, fol. 365).

On January 20, 1920, the expiration date fixed on the original "pledge contract", Coccaro filled out another printed form of respondent's (Exhibit 30, R. 295) paid its charges by his check for $101.49, and obtained a renewal of the loan to March 23, 1920 (R. 295).

The Issues in the Case.

Respondent contended that its proceedings thus outlined constituted a "loan of credit" rather than a loan of money, and did not, therefore, come within the purview of any usury law; though the rates paid by Coccaro far exceeded the legal rate of 6% per annum.

Petitioners claimed that this was clearly a usurious loan, only transparently disguised by respondent's device of first issuing its *note* instead of its *check;* that, therefore, the transaction was void as to Coccaro, and, consequently, as to petitioners, whose title to the salmon was derived from him.

In other words, this Court will have to decide whether the respondent has astutely devised a method of lending money which will protect it from the usury statutes, when, for all practical purposes, it really *is* conduct-

ing a systematic business of lending money, without the supervision of any banking law.

The jury, clearly presented with the question by the trial Court, decided upon the facts that respondent's system, with its printed papers and regular arranged methods, was simply a device to cover loans of money. The Circuit Court of Appeals has reversed this finding of fact and has held, in effect, that respondent has evolved an unbeatable plan to avoid the usury statute, irrespective of the place where, or the circumstances under which, it is used.

The opinion of the Circuit Court of Appeals concludes by saying (MANTON, *J.*, writing):

> "The only defense urged below is that of usury. We hold that this transaction was not usurious and judgment should have been directed for the plaintiff-in-error."

Petitioners contends that this judgment of reversal is erroneous because:

> 1. The holding of the Circuit Court of Appeals that, as matter of fact, respondent did not violate the New York Usury Statute, because in effect it issued to the borrower or to its own bank, its *note* instead of its *check,* amounts to a judicial repeal of the New York Usury Statute; and in view of the finding of the jury, sustained by the trial Judge, that the transaction was *in fact* a usurious loan, exceeds its jurisdiction as limited by Section 879 of the Judicial Code.
>
> 2. It interprets the usury statute of the State of New York in a manner directly contrary to the interpretation thereof by the courts of that

state notwithstanding the rule laid down by this Court as to the controlling effect of State usury statutes and decisions, in *Missouri, etc., Trust Co.* v. *Krumsweig*, 172 U. S. 351, and contrary to the decisions of this Court, notably *Andrews* v. *Pond*, 38 U. S. (13 Peters) 65; and *Tilden* v. *Blair*, 21 Wall. 241.

POINT I.

The judgment of the Circuit Court of Appeals is erroneous, because

(a) The finding of the jury that respondent's systematic devices for alleged "loans of credit" merely disguised actual loans of money at a usurious rate, was made with respect to a question as to which the jury was the proper and exclusive trier of the facts; the reversal of such finding of fact exceeded the jurisdiction of the Circuit Court of Appeals, as limited by Section 879 of the Judicial Code.

(b) The evidence fully justified the jury's conclusion that respondent's device of issuing its note instead of its check amounted to a mere matter of form, and that the transaction between respondent and Coccaro was really a usurious loan.

(1)

The usury statute of the State of New York (General Business Law, Secs. 370, 371, 373 and 380—printed in full as Appendix A) makes void any instrument or

security given for the loan of money, goods or things in action at a rate in excess of six per cent. per annum.

Usury is thus forbidden by statute, with severe penalties for violation; but the business is notoriously a highly profitable one, and therefore, highly attractive. It is scarcely to be expected that the experienced and habitual money-lender will not attempt to ply his lucrative pursuit, under euphemistic titles, with every variety of form and disguise that experience, skill and ingenuity can suggest. The Courts have, therefore, uniformly held that, whatever the form of the transaction, its real nature is to be determined as a question of fact.

Lord Mansfield said, in *Floyer* v. *Edwards*, 1 Cowp. 112, 114:

> "Where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute."

An unbroken series of decisions has held that whether or not the form of a given transaction represents such an attempted shift, is a question for the jury.

The decision of the Circuit Court of Appeals here under review, represents the first break in that series; for it cannot be denied that its judgment is, in the main, an affirmative finding on that very question disregarding the jury's conclusion.

The record makes it perfectly evident that respondent is a money-lending institution. The opinion of the Court of Appeals describes it as "a corporation doing a warehouse business" in Pennsylvania—*an evident error,* as the record shows *it has no warehouse and never operated one anywhere* (R. 108), nor is it licensed to do business under the banking laws of either New York or Pennsylvania. Whatever forms or methods it

has invented, cannot conceal the fact that it *was* doing what it advertised *to* do, *i. e.*, making "Time loans on merchandise" (Exhibit H, R. 364, fol. 447).

The "Loan of Credit" Theory.

The respondent seeks to justify its exactions by asserting that it is not lending money, but is "lending its credit".

In the course of the development of case law, that expression has been much used, much criticised, and frequently repeated with a looseness or absence of definition, which has caused much confusion of ideas and words. The explanation of this seems to be the disinclination of courts, at one time, to enforce the usury laws, particularly in isolated transactions between individuals, or in cases where there were practical difficulties for bankers in exchanges of money and credit between town and city. In 1842, Judge Cowen, of New York, took occasion to note (4 Hill (N. Y.) 254):

> "I am aware the modern notion on the subject of usury is so latitudinary, that judges are put on the defensive for holding almost anything to be within the statute."

Since that time, conditions have changed very much. Isolated lending transactions (as to which Judges felt it was not fair play to return a favor, even if paid for, by pleading usury) are the exception rather than the rule. Various devices, formerly used, have disappeared, such as the plan of giving a borrower "post-notes" instead of money, disapproved by this Court in

Gaither v. *Farmers Bank*, 1 Peters 37,

whereby the borrower had to carry the lender's expense for selling the latter's depreciated notes. So, also, the New York reports show no further history of the alleged "Commercial Warehouses" which did not warehouse but which charged "commissions" for pretended services, which were held usurious, in cases such as

> *Caldwell* v. *The Commercial Warehouse Company of New York*, 1 Hun 718;
> *Merchants Bank* v. *Same*, 49 N. Y. 634.

One cannot "lend" an impalpable, intangible thing, such as its "credit", which cannot be repaid. The expression is a misnomer. Nor is it logical for respondent to speak of "selling" its *credit*. This confuses the means and the end. What it must really claim is that it was lending to Coccaro its own *notes*, which it issued especially as a means of raising money, which money the borrower was to repay to it.

There is a good reason, however, why respondent does not state the *actuality*, but prefers the use of a meaningless *phrase*. That is because the usury law of the State of New York likewise forbids loans of *things in action* where more than 6% is charged. Notes are *"things in action"*. The notes being discounted immediately—on respondent's own theory, the substance and effect of lending the *notes* was to lend the *money*.

In *Dunham* v. *Dey*, 13 Johns. 40, Spencer, *J.*, asked:

> "What is the difference between a man's lending his notes to raise money upon, taking more than legal interest, and lending his money? I confess I perceive no other difference than this: that the borrower of the notes must probably pay more usury, to get them converted into cash. But the transaction is substantially a lending of money,

and I agree with defendant's counsel, that if this device be tolerated, the statute is judicially repealed."

In affirming the judgment in that case, Chancellor Kent wrote that he was entirely of the same opinion.

Dunham v. *Gould*, 16 Johns. 367.

At best, it is difficult to draw a distinction (if there is any) between the legal or logical effect of respondent's carrying out its arrangement with the borrower—Coccaro—by sending him cash or its own *check*, drawn upon its own bank (which would undoubtedly be a loan) or providing the funds for the same purpose by discounting (or having its broker discount) its own note so that the proceeds reached the borrower (which, it contends, is a "loan of credit"). In the particular transaction outlined in the foregoing statement of facts, respondent actually received from the First National Bank of Philadelphia a cashier's check of that bank (Exhibit 27, R. 293) to respondent's own order, endorsed the same back to it, and by letter of the same day, directed the same bank to forward the identical amount represented thereby, to Coccaro at New York (Exhibit 26, R. 293).

There is no proof that respondent could not just as well have signed its check drawn directly to Coccaro's order, or could not (if it had no funds on deposit) have raised such funds by discounting its own note with its own bank, and then drawn its check upon the fund so created. The insistence of respondent through the case upon its "high credit" and financial standing, shows that it could readily have done so. In this case Coccaro issued no notes. Respondent neither endorsed nor guaranteed any notes

for him, but got money to him by discount of its own notes. Either way, he got the same thing; either way there was a loan. Thus, the asserted distinction between "lending its credit" and lending money to Coccaro, reaches the verge of disappearance.

The fact is, respondent never even gave its notes to the borrower Coccaro; but on one ocassion direct to the Centennial Bank (R. 110, fol. 145) and in all other cases to S. B. Lewis & Company, note brokers named by respondent itself. These brokers handled transactions for it amounting to millions of dollars a year (R. 163); and respondent used printed forms as part of a regular routine, purporting to have the borrower appoint S. B. Lewis & Co. as agents of the borrower to discount respondent's note (R. 287, Exhibit 22). The speed and the stereotyped form of the transactions between respondent and Lewis (R. 164-167) show that, in effect, Lewis was merely an agency of respondent by which it either raised money to lend to its customers or sought to have it appear that it so procured the funds which it lent. *So transparent and creaking a device did not fool the business men on the jury; but its significance evidently escaped the attention of the Court below.*

If it be claimed that there was a sale of credit or of the notes, to the borrower, we may point out here that this neither squares with the advertised business of the respondent (p. 3 of this Brief) nor with the testimony. The borrower did not want notes, he wanted money. According to the insistence of respondent upon its A1, high credit, the borrower was led to believe that respondent's note was, in effect, money. The whole stage-dressing and phrase-making here are due to the actualities of the situation. A borrower wants money. A lender wishes to

lend, but insists upon a form or shift, worked out on a systematic basis, to distinguish tweedle-dum from tweedle-dee—a smoke-screen to hide what is really being done.

In the case at bar, no matter how respondent sought to conceal it, the sole aim in view was for the borrower, Coccaro, to get a loan of money on his merchandise. Cosgrove testified repeatedly that the former said so (R. 129). The machinery by which respondent obtained the money to make that loan (whether by issuing its note and discounting it itself or by having it sold by a broker or by drawing its check) was of no interest to the borrower, but simply the concern of respondent as to where and how it could get the money in accordance with its agreement to make "Time Loans on Merchandise".

In concluding our discussion of respondent's "loan of credit theory", we wish to emphasize that, after all, it is a mere theory; whether there was any such loan of credit in the case at bar, or whether it was, in fact, a mere usurious loan of money masquerading under a convenient name, was for the jury to decide. We contend that the jury has decided it, and that the Circuit Court of Appeals was concluded by that finding.

The authorities in point until the opinion below all hold that—if the "loan of credit" theory can be sustained, at all—it can only be sustained when the jury is convinced that, in fact, the transaction was not intended as a loan of money or its equivalent.

The situation has been thus explained in

> 29 American and English Encyclopedia of Law 472:

> "But if the transaction is in fact a loan or forbearance, the lender cannot, by giving to it

the form of a sale of credit, prevent it from falling within the prohibition of the usury statutes; and it has been said *that transactions in the form of a sale of credit are to be viewed with great jealousy, as they are extremely liable to be perverted to usurious purposes.* After a person has accepted a bill or indorsed a note for another, his subsequent payment of such bill or note is a loan or advance, and he cannot, in addition to the maximum rate of interest on the money so loaned or advanced, charge a compensation for such loan or advance without rendering the transaction usurious,"

which cites, among other cases,

Beckwith v. *The Windsor Manufacturing Co.*, 14 Conn. 605,

where the Court says:

"The question whether the transaction was fair, and *bona fide*, or a cover for usury was submitted to the jury, and they have found in favor of the validity of the transaction, judgment was rendered accordingly—page 606.

Should it be said that great danger may be apprehended from the perversion of such contracts to usurious purposes, the answer is, that whenever they are so perverted, they will be void. The intent of the parties in making the contract must govern; and that is a question of fact, to be determined by that tribunal whose business it is to pass upon such matter; and if an usurious intent is found, it will vitiate the contract."

In *Carstairs* v. *Stein*, 4 Maule & S. 192 (105 Eng. Reprint, 805), Lord Ellenborough aptly remarked:

"Commission cannot be added to the amount

of legal interest for the purpose of inducing a loan of money to be made and of recompensing it afterward, when made. All commission, where a loan of money exists, must be ascribed to and considered as an excess beyond legal interest, unless as far as it is ascribable to trouble and expense, *bona fide* incurred, in the course of the business transacted by the persons to whom such commission is paid * * *.

These circumstances certainly laid a foundation for suspecting that the high rate of commission contracted for was a colour for usury upon loans which were stipulated not to be required but were in fact required, and made from the beginning to the end of this business.

But the question, i. e., whether colour or not, was a question for the consideration of the jury * * *. The jury having drawn a different conclusion, and which conclusion, upon the view they might entertain of the facts, they were at liberty to draw, and they having done so, we do not feel ourselves, as a Court of Law, but acting according to the rules by which Courts of Law are usually governed in similar cases, at liberty to set aside that verdict and grant a new trial."

Indeed, the principle asserted in the concluding part of this quotation, seems to be now fortified by express statutory enactment.

Section 879 of the Judicial Code—Title 28 of the Code of the Laws of the United States (formerly Section 1011 of the Revised Statutes)—reads:

"Reversals on Error Limited. There shall be no reversal in the Supreme Court or in a Circuit Court of Appeals upon a writ of error, for error in ruling any plea in abatement, other than a

plea of jurisdiction of the court, ***or for any error in fact."***

(2)

We submit that the finding of the jury was based upon the evidence in the record, as interpreted by the Courts of the State of New York.

In ***Missouri, etc., Trust Co.*** **v.** ***Krumsweig*****, 172 U. S. 351, this Court said:**

> **"When a State thinks that the evils of usury are best prevented by making usurious contracts void, and by giving a right to the borrowers to have such contracts unconditionally nullified and cancelled by the Courts, as in this case, such a view of public policy in respect to contracts made within the state and sought to be enforced therein, is obligatory on the Federal courts, whether acting in equity or at law; and the local law, consisting of the applicable statutes, as construed by the Supreme Court of the State, furnishes the rule of decision."**

We submit that the Circuit Court of Appeals has not applied this principle to the case under review.

The contract was sought to be enforced in the State of New York; we show that it was made there; and we contend that the New York statutes, and the decisions of its Courts thereunder, were to be applied to the facts in this record.

We have noted that the rate paid by the borrower was far in excess of six per cent. The New York courts have decided that, where the lender imposes as a condition of the loan that the borrower pay commissions to a third person selected by the lender, the amount

thereof is to be considered in calculating the real rate of interest paid.

> *Kaufman* v. *Schwartz,* 183 App. Div. 510-2.

> "If it were clearly shown that the broker was employed by the defendant, and payment of a commission to him was made a condition of the loan, or that the payment of a fee to his attorney was required by the lender, we are of opinion the statute would have been violated."

The expression is merely a re-statement of the rule expressed by this Court.

> *Bank of U. S.* v. *Owens*, 2 Peters 536-7;
> *Fowler* v. *Equitable Trust Co.*, 141 U. S. 385 at page 405.

The record shows an extremely close relationship between respondent and Surprenant. Respondent had no office of its own in New York, and its secretary, Cosgrove, frequently used Surprenant's office in that City (R. 104-105). Though Cosgrove at first denied any direct financial dealings with Surprenant (R. 124, fol. 161) the mere casual inspection of respondent's books possible in the Court room during the course of the trial, disclosed several instances where Surprenant had brought other customers to respondent and had received a percentage from it on such business (R. 127). The rule of the New York case cited seems to be a necessary one, otherwise excessive interest rates could readily be cloaked as "commissions" to inside brokers.

But even without counting the money respondent required Coccaro to pay to Surprenant, the exactions of respondent exceeded the legal rate of six per cent.

In *Hooley* v. *Talcott,* 129 App. Div. 233, the New York Appellate Division said:

> "In all these transactions Talcott was acting as a money lender solely * * * There were no dealings between Talcott and Scherr pursuant to which any moneys became due from Scherr to Talcott other than these loans made pursuant to the general arrangement between Bush, Scherr's agent, and Talcott. The net result of these transactions was that Talcott received amounts aggregating something over 9% to something over 12% per annum, the interest and commissions in all cases being paid in advance * * * *It appears that the alleged commissions were a fixed percentage of one-quarter or one-half per cent. a month for the amount loaned either deducted from the amount loaned or paid in advance, and regardless of whether there were any appraisals or substitution."*

This New York case, not referred to in the opinion below—although stressed in our brief and relied on by the trial Judge (R. 263) is directly applicable to the facts in this record; for here also, as in *Hooley* v. *Talcott,* there were no other dealings between the parties pursuant to which any moneys became due from Coccaro to respondent, except the arrangement for the loans; and here, also, the "fixed commission" of 3% was payable regardless of, and not as compensation for, any actual care of collateral or other services, not rendered, nor ever intended to be.

Indeed, we conceive it to be a rule often laid down by this Court that the *form* of a transaction or the printed devices used as a cover therefor, cannot prevail to hide the real dealings between the parties.

This Court in *Andrews* v. *Pond,* 13 Peters 65, at page 76, said:

> "But although the transaction, as exhibited in the accounts, appears on the face of it to have been free from the taint of usury, yet, if the ten per cent., charged as exchange, or any part of it, was intended as a cover for usurious interest, the form in which it was done, and the name under which it was taken, will not protect the bill from the consequences of usurious agreements; and if the fact be established, it must be dealt with in the same manner as if the usury was expressly contracted for in the bill itself. But whether this item was intended as a cover for usury or not, is a question exclusively for the jury."

Without repeating the testimony at length we may recall the attention of the Court to respondent's advertisement, offering "Time Loans on Merchandise" which is the beginning of the transaction, to the admissions of plaintiff's own secretary, Cosgrove, who came to New York to interview the borrower, Coccaro (R. 129, R. 76, R. 130, R. 102, R. 103, R. 104, R. 108, R. 109); and to the testimony of Coccaro's employee, McAndrew, corroborated by the records of the business and from Cosgrove's admissions, with the necessary inferences therefrom (R. 194, 195, 196, 197).

We submit that this testimony, beginning with Cosgrove's admission (R. 129):

> "Q. When you spoke to Coccaro he wanted to borrow money, did he not? A. As far as I can recall, yes.
>
> Q. *And he applied to you for a loan of money, did he not? A. He did.*"

shows that Coccaro got from respondent what he wanted, a loan of money, despite the fact that Cosgrove recited to the borrower a "set form of words" which respondent employed in all such transactions (R. 130) by using papers prepared by respondent's attorney to comply with the law (R. 197); and that there was a distinct agreement (R. 195) for the lending and borrowing of money at rates in excess of those allowed by the usury statutes of the State of New York.

None of the authorities cited by the Circuit Court of Appeals really holds to the contrary.

The case of

> *Righter & Cowgill* v. *Philadelphia Warehouse Co.*,

is the one upon which respondent rests its patent to ignore the usury law, and it is apparently given such an effect by the Court below.

In that case (*Righter & Cowgill* v. *Philadelphia Warehouse Co.*, 99 Penna. State, 289) the Pennsylvania Court held *on the record there before it* that the 3% charged by respondent represented actual services performed in the care of collateral which services were testified to by witnesses (see Opinion, 99 Pa. State, top of 294), and that there was no evidence at all of any other agreement than the papers offered by the respondent. There was no testimony as to the negotiations between the parties or as to the actual agreement they had reached.

In that case, the Pennsylvania Court said (99 Pa. State at p. 294):

> "As appears from the testimony of John Neill, one of defendant's witnesses, there was consider-

> able trouble connected with the care and custody of the collateral * * *. There was not a scintilla of evidence that the $30 was paid for any other purpose than that expressed in the agreement, and *in the absence of proof* neither court nor jury had a right to presume it was intended for anything else." (Italics ours.)

The record in the instant case, however, showed that no expenses were incurred by respondent for the care of collateral, which was in a public warehouse and required no care by respondent (R. 128, 129), and that the 3% "commission", not to speak of Surprenant's 12% (R. 195), was really for additional compensation over and above 6% for lending out money, as it was held to be by the New York Appellate Division in *Hooley* v. *Talcott.*

Indeed—contrary to the situation in the *Righter & Cowgill* case—the testimony in the case now before this Court is that respondent delivered the bill of lading for the 1,000 cans of salmon to the warehouse in which it was to be stored and that Coccaro paid to such warehouse for all expenses of handling, care, insurance, etc. (R. 294, Exhibit 29; R. 127, fol. 165).

We submit, therefore, that the situation in the case at bar is not governed by the *ratio decidendi* of the *Righter & Cowgill* case, but is on all fours with *Hooley* v. *Talcott.*

Petitioners, it is true, were not parties to the transaction between the Philadelphia warehouse, the respondent, and Coccaro, in connection with which the usury occurred. But petitioners are innocent purchasers of the merchandise claimed by respondent, and as such are entitled to question the title of respondent thereto.

> *Lloyd* v. *Scott*, 4 Peters 205;
> *Matthews* v. *Coe*, 56 Barb. 430, at p. 441;
> *Merchants Exchange Bank* v. *New York, etc.*, 49 N. Y. 643.

Inasmuch as respondent's title to the merchandise rested upon a transaction void for usury, its title failed, and it could not recover for conversion as against petitioners, *bona fide* purchasers of the goods in question.

POINT II.

The trial Court properly held that the contract was governed by the law of the State of New York where the agreement between respondent and the borrower, Coccaro, was negotiated and definitely concluded.

Although the Circuit Court of Appeals founded its opinion squarely on the fact that the "transaction was not usurious" (R. 398), it suggested incidentally that it was governed by the Pennsylvania statute (which forfeits only the usurious interest upon a loan) and not by the New York statute, which prohibits recovery of the principal of the loan, as well.

Judge Manton based this conclusion upon

1. The fact that the printed form of "Pledge Contract" prepared by respondent (R. 396), required the borrower to repay the money to it in Philadelphia (R. 397), and

2. The argument that the contract for the loan or "loan of credit" was not complete until respondent delivered its notes to the note-broker Lewis in Philadelphia (R. 397, fol. 494).

We urge that the Circuit Court of Appeals erred on both these points, because:

A. The undisputed evidence showed that in New

York there had been a complete meeting of the minds of respondent by Cosgrove, its secretary, and Coccaro, upon every essential element of the agreement between them.

B. The provision of the pledge contract that the money was to be repaid by Coccaro to respondent in Philadelphia, did not make that city the "place of performance", but was a mere incidental and immaterial circumstance, as is best shown by the fact that Coccaro actually repaid certain of the moneys to respondent at its bank in New York (R. 118, 119-120, 132, 140).

A.

The following summary shows what was done in New York:

1. Respondent advertised in the New York Journal of Commerce offering merchants in New York "time loans on merchandise" (Exhibit H, R. 364);

2. Respondent was doing business of that character in New York with merchants other than Coccaro (fol. 140, R. 105, 121);

3. Cosgrove, respondent's secretary, usually came to New York to transact such business for it (R. 106);

4. Cosgrove, was *authorized to,* and did, arrange for and *complete* transactions with respondent's customers in New York (R. 105);

5. Cosgrove met Coccaro (or McAndrews, his confidential man) in New York for the purpose of discussing arrangements by which Coccaro could get money (R. 102);

6. Cosgrove admitted that in New York Coccaro squarely asked him for a loan of money (R. 129-130) for which he was willing to give merchandise in the warehouse in New York as collateral (R. 130);

7. Cosgrove in New York stated to Coccaro the terms of the transaction, the rate at which plaintiff would advance the money, to wit: ¼, ½ and 1% per month and that it would not make the loans except through Surprenant and upon payment of a "commission" to the latter (McAndrew, R. 195, 196);

8. It was in New York that respondent's printed forms of "pledge contract" and request to the note-brokers to sell the notes, were signed by Coccaro (R. 108) and delivered to Cosgrove (R. 104 and 112), though purporting to be dated at Philadelphia;

9. That, at the same time, a bill of lading for the merchandise was delivered as collateral to Cosgrove in New York (R. 260, 261);

10. That a check for ¼ of 1% plus the stamp tax were then delivered to Cosgrove in New York (R. 109);

11. That it was then arranged in New York that respondent would advance moneys to Coccaro provided an investigation showed that Coccaro's representation as to the value of the security was substantiated (R. 76);

12. That such investigation as to the valuation of the merchandise was made by Cosgrove himself in New York (R. 103), before he returned to Philadelphia (R. 77);

13. That the net proceeds obtained on various of respondent's notes were transmitted by respondent's own directions to the Irving National Bank in New York with instructions to deposit the same to the account of Coccaro, pursuant to an agreement to that effect (R. 109);

14. That respondent maintained an account in the Chase National Bank in New York (R. 118) and that payments by Coccaro on account of respondent's advances were made by depositing the same in its said account in that bank in New York (R. 118, 119-120, 132, 140).

A situation identical for all practical purposes was considered in *Hooley* v. *Talcott* (129 App. Div. 233).

In that case, Talcott made arrangements in New York with Bush, the agent of a Philadelphia merchant named Scherr. Scherr was to obtain moneys from Talcott, and to pay him therefor 6% interest and a commission of from one-quarter to one-half per cent. per month (See Opinion in that case, at p. 234). The method of making these loans was in every instance substantially the same. Scherr signed and endorsed blank notes and sent them to Bush in New York. Bush filled them in, *dated them at Philadelphia, payable by Scherr at a bank in Philadelphia,* and then delivered them to Talcott. Talcott thereupon gave his check to Scherr, either for the full amount of the loan (or for the amount of the loan less interest) and commissions. As security for these loans, silk belonging to Scherr stored in a warehouse in New York, was turned over to Talcott as collateral security.

The Appellate Division, summarizing the facts, said:

> "The application for the loan was made by the borrower's agent to the defendant in the City of New York; the agreement entered into upon such request was made in the City of New York; the notes, though made payable, for the convenience of the borrower, at a bank in Philadelphia, were delivered to the defendant by the borrower's agent in the City of New York; the interest and the so-called commission was paid to the defendant in the City of New York; the money loaned was in possession of the defendant in the City of New York, and although the checks representing the same were sent to the borrower in Philadelphia, those checks were paid by the money of the defendant in the City of New York, and the goods—the collateral security for the repayment of such loans, were actually stored in the City of New York. *It seems to me that upon the whole transaction there is no doubt that the agreement at bar was a New York contract. The contract was for the loan of money upon the security of warehoused merchandise. The minds of the parties upon that contract met in the City of New York, where the agreement to loan upon such security was made.*"

Whatever may have been the rights of respondent in the instant case while operating in the State of Pennsylvania, under the statutes thereof, it deliberately elected to subject itself to the laws of New York when it assumed to do business in that State, to advertise for business in New York, to interview customers in New York, and to conclude agreements in New York with them. As to such transactions, it could stand on no different

footing than a New York concern doing a similar business there.

In the present case, nevertheless, the Circuit Court of Appeals said that (R. 397):

> "The loan did not have its inception in New York nor was it completed in New York. The transaction was carried out in Philadelphia. * * * The pledge agreement was drawn and dated in Philadelphia; the contract was a unilateral one and did not become binding in its terms until the plaintiff-in-error issued its note; that act was done in Philadelphia."

In this, we submit, the Circuit Court of Appeals erred.

What was there "unilateral" in the contract disclosed by the evidence just summarized? The parties' representatives had met; when they parted, they had reached an agreement; respondent had agreed to make the "deal", whatever name it be given, and Coccaro had agreed to accept it; the amount, the period of the loan's duration, the charges, the amount and kind of security—all had been agreed upon. The minds of the parties had met in New York on every essential element of an agreement, whatever label the transaction be given. There was nothing further to be done except to carry that agreement out.

The only sense in which that agreement could be deemed "unilateral", was that Coccaro had simultaneously entirely *performed his part of it, i. e.,* signed the papers proffered to him by Cosgrove, and delivered to Cosgrove his check for commissions and his endorsed Bill of Lading. What remained was *not* for respondent

to *accept* any agreement, but to perform, that is, to *carry out its part*, to get the money to Coccaro.

What was that "agreement" which Cosgrove admits he had made? (R. 103, fol. 137). To call the "pledge contract" (Exhibit H) the contract *per se* would be a misnomer. It is not signed by plaintiff, and provides for nothing to be done by it. If this form means anything at all, it is one element in a transaction to be construed with all other factors in finding what the real agreement was. This printed form was simply evidence, of no higher probative force than any other evidence. There is no agreement or contract in the four corners of the documents produced by respondent. Nothing was signed by it, or formally agreed to or accepted by it in writing at any time. It is hardly necessary to cite authority that where the contract is not contained within the four corners of an instrument, it *can* be spelled out partly from letters and documents and partly from testimony—each item furnishing part of the proof necessary to determine what the real contract and agreement of the parties was. Particularly is this the case when the only purpose of some of the "documents" is to conceal, mis-state or cover the real agreement made.

> *Gage* v. *J. F. Smyth Mercantile Co.*, 150 Fed. R. 429.

It seems clear that the agreement between the parties was not conclusively evidenced by the papers signed by Coccaro (not signed by respondent, no copies of which were left with Coccaro, and the recitals of which were palpably incorrect); when every essential element of a meeting of the minds of the parties existed when Cosgrove left New York City. The real arrangement as found by the jury—and the one which it decided was usurious—

was that which was made at the meeting between McAndrews and Cosgrove in November, 1919, referring to the entire series of loans here in question, and this real agreement coincides substantially, even upon Cosgrove's own statement, with what he claims took place in his subsequent interview with Coccaro (if there ever was any such thing). At that interview (or interviews) all the details of the transaction were provided for; and the agreement for the usurious loan was consummated. Nothing was left undone, except to carry it out.

> *St. Johns* v. *Fowler*, 183 App. Div.;
> *Anom Realty Co.* v. *Delancy Garage*, 190 App. Div. 745.

For the purpose of having the admissions on that point clearly before the Court, we reprint them, as follows:

R. 103:

> "Q. So, then, I am correct in stating that in each one of those transactions that are included in this bill of particulars of yours, you came to New York City, and made the arrangement with Coccaro, told him that the deal was closed if you satisfied yourselves as to the value of the goods, and when you had satisfied yourselves as to the value of the goods, then *the deal was closed so far as the arrangement between you and Coccaro was concerned?* A. *So far as the agreement to do what we undertook to do was concerned.*"

R. 104:

> "Q. These papers that you gave to Coccaro were shown to Coccaro, and you had him sign, and he signed in your presence in New York? A. That is correct."

R. 76:

"A. I said that if the salmon were found by us to be substantiated as to the value set on it by him, from inquiry made *by me* in the trade *that day,* I would, upon my return to Philadelphia the *next day,* see that the note called for was issued."

R. 102:

"Q. In other words, when you left Coccaro's office that day *that was a deal that was closed?* A. No, I beg your pardon; subject to a satisfactory appraisal and examination of the collateral."

R. 103:

And in reference to such appraisal and examination:

"Q. *You* did that likewise, did you? A. Yes, *I did.*"

We submit that this makes it perfectly clear that there was a final and binding agreement to loan money (or issue a "note", as respondent contends) between the parties in New York, made between Cosgrove, respondent's secretary, who was in full charge and authority in the matter, and Coccaro (R. 103); the deal was closed. It was only subject to the same man's (Cosgrove) making an examination and a satisfactory appraisal of the collateral which he, Cosgrove, did in New York that day (R. 111) *before returning to Philadelphia.*

R. 77:

"Q. In the meantime, had you made your investigations, or did you then make your investigations with regard to the salmon and its value? A. I did.

Q. And what occurred, if anything, further in that transaction in Philadelphia or elsewhere? I mean what was the next occurrence in that transaction? A. On the morning following, namely, November 19th * * * (fol. 104) there was issued in the office of the Company in Philadelphia a promissory note for $5,900."

B.

The fact that respondent went through the form of obtaining the money for Coccaro by issuing its note in Philadelphia, having it discounted by Lewis, there and then forwarding the proceeds to Coccaro at New York, does not make Philadelphia the "place of performance" of the contract. Nor does the fact that Coccaro nominally "agreed" to repay respondent at Philadelphia. Obtaining the money by respondent was not performance of the contract: payment to Coccaro was. The place of repayment to respondent and the place where it might obtain moneys were merely matters of convenience for respondent, and not essentials in the agreement made in New York, the purpose of which was to get funds to Coccaro there.

In *Tilden* v. *Blair,* 21 Wall. 241, a note was drawn in New York and payable in New York. The drawer sent it to Chicago, intending that it be delivered and negotiated there. This Court held that the law of the place of the contract governed; that the controlling circumstance was that defendant sent his note to Chicago to be there delivered and negotiated; that the place of payment (in New York) was not the place of performance.

By analogy, respondent having sent its representative to transact and conclude business in New York, must be deemed to have contemplated the effect of the laws of that State—either to comply therewith, or to attempt to devise a way to avoid them. In seeking the "intent of the parties" as to which law should govern their agreement—made at New York as we have shown—mere recitals in the papers prepared by respondent are of no avail.

In *Russell* v. *Southard,* 12 Howard 927 (53 U. S. 139), this Court said:

> "In respect to the written memorandum, it was clearly intended to manifest a conditional sale. Very uncommon pains are taken to do this. Indeed, so much anxiety is manifested on this point, as to make it apparent that the draftsman considered he had a somewhat difficult task to perform.
>
> But it is not to be forgotten that the same language which truly describes a real sale, may also be employed to cut off the right of redemption, in case of a loan on security; that it is the duty of the Court to watch vigilantly those exercises of skill, lest they should be effectual to accomplish what equity forbids, and that in doubtful cases the Court leans to the conclusion that the reality was a mortgage and not a sale.
>
> It is true that Russell must have given his assent to this form of the memorandum; but the distress for money under which he then was, places him in the same condition as other borrowers in numerous cases reported in the books, who have submitted to the dictation of the lender under the pressure of their wants; and a court

of equity does not consider a consent thus obtained, sufficient to fix the rights of the parties. 'Necessitous men', says the Lord Chancellor in *Vernon* v. *Bethell,* 2 Eden 113, 'are not, truly speaking, free men; but to answer a present emergency, will submit to any terms that the crafty may impose upon them'."

Indeed, the meeting of the minds of Cosgrove and Coccaro, on behalf of the parties who arranged the loan, having so clearly been made in New York, and the forms devised by respondent being so evidently an "exercise of skill" to avoid the effect of that circumstance, the situation becomes that commented on by this Court in *Andrews* v. *Pond,* 38 U. S. (13 Peters) 65, in the following language:

> "The defendants allege that the contract was not made with reference to the laws of either State, and was not intended to conform to either. That a rate of interest forbidden by the laws of New York, where the contract was made, was reserved on the debt actually due; and that it was concealed under the name of exchange, in order to evade the law. Now if this defence is true, and shall be so found by the jury, the question is not which law is to govern in executing the contract; but which is to decide the fate of security taken upon a usurious agreement which neither will execute? *Unquestionably, it must be the law of the State where the agreement was made, and the instrument taken to secure its performance. A contract of this kind cannot stand on the same principles with a bona fide agreement made in one place to be executeJ in another.* In the last mentioned cases the agreements were permitted by the *lex loci con-*

tractus; and will even be enforced there, if the party is found within its jurisdiction. But the same rule cannot be applied to contracts forbidden by its laws and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there it is void anywhere; and the cases referred to in Story's Conflict of Laws, 203, fully establish this doctrine."

In *Hooley* v. *Talcott, supra,* Justice Clark, writing for the Appellate Division, said (p. 240):

> "The rule deducible from all these cases is that the whole transaction will be looked into to ascertain where the real contract, the meeting of the minds, simply evidenced by the instrument, took place. When that is ascertained neither the date of the instrument, where signed, or where payable, is controlling. In the cases cited the instruments though signed and made payable in New York, were held not to be New York contracts because the agreement which they evidenced took place elsewhere. The converse must be true. *As in the case at bar the agreement to loan money and to deposit goods as collateral security took place in New York the contract was a New York contract though the notes evidencing that transaction were signed and made payable in Pennsylvania.*"

This conclusion is sustained by other authorities, in the New York Court of Appeals, e. g.:

> *Wilson* v. *Lewiston Mill,* 150 N. Y. 324;
> *Wayne County Savings Bank* v. *Lowe,* 81 N. Y. at page 571.

The following quotation from the latter case illustrates our argument:

> "The note in suit was actually written in Pennsylvania in the form in use in that State by the cashier of the plaintiff, at the defendant's request, and forwarded by the cashier to the defendant for signature, and was signed by the defendant in New York, and then mailed by him to the plaintiff in Pennsylvania, together with a check for the discount at the rate of eight per cent., which was lawful in Pennsylvania. The note and interest were consequently received by the plaintiff in Pennsylvania, and *all this was done in performance of a previous agreement which had been entered into in Pennsylvania between the plaintiff and defendant. All that was done by the plaintiff in New York was simply an execution of that agreement, and* as is said in *Dickinson* v. *Edwards* (p. 580), in citing *Tilden* v. *Blair, the designation of the place of payment of the note was an incidental circumstance for the convenience of the maker, and not an essential part of the contract, or with the intent to affix a legal consequence to the instrument. It cannot be contended that a party who goes into another state and there makes an engagement with a citizen of that state for a loan or forebearance of money,* lawful by laws of that state, *can render his obligation void by making it payable in another state* according with whose laws the contract would be usurious."

If a party who goes into another state and makes an engagement there, cannot render his obligation void by making it payable elsewhere, it follows that he cannot prevent it from being void by merely making it payable in another state.

CONCLUSION.

The verdict of the jury represents the justice and merits of the case, and the judgment of the Circuit Court of Appeals setting it aside should be reversed.

Petitioners need not argue whether the penalties imposed by the usury statute are severe or the law be artificial. That is a question of economics for the legislatures. But the rule of law which permits a concededly *bona fide* purchaser of goods to be held liable for conversion a year after he has purchased, in the open market, merchandise publicly advertised in the usual newspapers, is just as artificial, and the incidence of the hardship upon such reputable merchants is even more severe, since they are not money-lenders seeking to escape from public policy as crystalized by statute.

The Statute still stands upon the books of the greatest commercial state in the Union, and is obeyed by the great financial interests of the nation.

The trial Court admonished the jury not to be swayed in either direction by sympathy (R. 264). That the jury heeded his admonition is evidenced by the long and careful consideration which they gave the case (R. 278). Whether Respondent's astute attorneys have devised a method of lending money which they think will protect it from the usury statute or not, no amount of explanation can gloss over the fact that it is lending money, and that the verdict is a common sense finding of what was really done.

We cannot resist the conclusion expressed in *Knickerbocker Life Ins. Co.* v. *Nelson,* 78 N. Y. 149:

> "It has been said and reiterated by the courts, from the time the schemes and contrivances of

> lenders became the subject of judicial examination, that there is no contrivance whatever by which a man can cover usury (*Jeston* v. *Brooke,* 2 Cowp. 793), and that no subterfuge shall be permitted to conceal it from the law (*De Wolf* v. *Johnson,* 10 Wheat 385), *yet if this agreement can stand it will require no wit or subtilty to circumvent the statute.*"

For, as aptly remarked in *In re Kellogg,* 113 Fed. Rep. 120:

> "The wisdom of the usury Statute is not to be questioned by a judicial tribunal. It is the duty of the Court to enforce the law and not to legislate. Where the proofs are clear and satisfactory, the court is bound to apply the remedy without giving consideration to the drastic and penal features of the statute applicable to the facts under consideration."

Since respondent seeks to compel innocent and reputable merchants to pay twice for the same merchandise, after waiting over a year before even intimating to them that such a claim existed, it cannot with good grace ask for any special consideration from the courts. Where the application of strict (and perhaps artificial) rules of law may cause loss to concededly innocent and disinterested petitioners or to a respondent which has deliberately assumed the risks of a traffic promising unusual returns, though involving a commensurate risk of conflict with statutory regulation, it seems to us that the verdict of a jury, based upon concessions of respondent's own witness, and sustained by a trial Judge of experience, should be as good a test as any, of what is just.

We therefore submit that the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A.

CONSOLIDATED LAWS OF THE STATE OF NEW YORK (Laws 1909, ch. 25).

General Business Law.

Section 370. Rate of Interest. The rate of interest upon the loan or forbearance of any money, goods or things, in action, except as otherwise provided by law, shall be six dollars upon one hundred dollars, for one year, and at that rate, for a greater or less sum, or for a longer or shorter time.

Section 371. Usury forbidden. No person or corporation shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed.

Section 373. Usurious contracts void. All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, or secured or agreed to be reserved or taken, any greater sum, or greater value, for the loan or forbearance of any money, goods or other things in action, than is above prescribed, shall be void.

Whenever it shall satisfactorily appear by the admissions of the defendant, or by proof, that any bond, bill, note, assurance, pledge, conveyance, contract, se-

curity or any evidence of debt, has been taken or received in violation of the foregoing provisions, the court shall declare the same to be void, and enjoin any prosecution thereon, and order the same to be surrendered and canceled.

Section 380. Brokerage on Loans. No person shall, directly or indirectly, take or receive more than fifty cents for a brokerage, soliciting, driving or procuring the loan or forbearance of one hundred dollars, and in that proportion for a greater or less sum, except loans on real estate security; nor more than thirty-eight cents for making or renewing any bond, bill, note or other security given for such loan or forbearance, or for any counter bond, bill, note or other security concerning the same.